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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-1610

IRVING GREENSPHAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Irving Greensphan, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on April 12, 1973.

Opinion Below

The opinion of the Court of Appeals is presently unreported. It is reprinted as Appendix A, infra.

Jurisdiction

The judgment of the Court of Appeals (Appendix B, infra) was entered on April 12, 1973. A timely Petition for Rehearing was filed, and was denied on May 2, 1973. (Appendix C, infra) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented for Review

1. Whether it is a scheme to defraud within the scope of the mail fraud statute for a manufacturer to pay monies to a purchasing agent absent actual loss by the agent's principal, or proof of other advantages obtained or intended to be obtained by the manufacturer?

2. Whether a victim of extortion may be prosecuted under the mail fraud statute by reason of his payment of kickbacks in response to the extortionate threat?

Statement of the Case

Petitioner Irving Greensphan was charged with Peter Yonan and Andrew George in a nineteen count indictment with devising a scheme and artifice to, "defraud and to obtain money and property by means of false and fraudulent pretenses and representations from Zenith Radio Corporation * * *" and with using the mails in execution of that alleged scheme, in violation of Title 18, United States Code, Sections 2 and 1341.

The indictment alleged that, as a part of the scheme, Yonan, an employee of Zenith, placed orders on behalf of Zenith to purchase cabinets from the Accurate Box Corporation, which was owned by the defendant Greensphan.

The indictment also charged that George billed Accurate for commissions and "kickbacks" on cabinets sold by Accurate to Zenith by submitting estimates from A & G Wood-

working, Estimating and Sales, Inc., owned by defendant George, to Accurate, and that Greensphan paid money to A & G based upon the number of cabinets sold to Zenith. In turn, George paid money to Yonan from the monies received by A & G from Accurate.

Lastly, the indictment charged that the defendants failed to disclose to Zenith that its employee, Yonan, was deriving commissions and kickbacks as a result of business conducted by him on behalf of Zenith, thereby depriving Zenith of its money and property; and that the defendants continued to represent to Zenith that Yonan was honest and loyal to the best interest of Zenith, and that they failed to disclose Yonan's "conflict-of-interest and disloyalty," thereby depriving Zenith of the honest and faithful performance of Yonan's duties.

Each count of the indictment alleged the mailing by Zenith of a check to Accurate in payment of cabinets manufactured for Zenith by Accurate.

Petitioner, Yonan and George were tried jointly before a jury, and each was found and adjudged guilty. Greensphan was sentenced to a term of six months in the custody of the Attorney General, and fined $1000 on each count.[1]

At trial, Greensphan was the only defendant to testify. Subsequently the prosecuting Assistant United States Attorney said, "* * * what [Greensphan] said from the witness stand was the substantial truth as to the transactions involved with the parties here." (Tr. 723) The prosecution's evidence and Grensphan's testimony thus established the facts of this case without contradiction.

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[1] Count 18 was dismissed prior to the submission of the case to the jury.

In approximately 1951, the Petitioner purchased the Accurate Box Corporation, and a few years thereafter met defendant Yonan, who subsequently was employed by Zenith Radio Corporation. In mid-1966 one P. J. Maloney, a Zenith purchasing agent and Yonan's immediate superior, asked Greensphan to look at Zenith's proposed new cabinet, to be called the "Circle of Sound." An employee of Greensphan's met with Zenith engineering personnel, and concluded that Zenith's proposal was not feasible. (Tr. 269-71; 427) The Zenith plans were given to Greensphan who, working with Zenith personnel, redesigned the cabinet. (Tr. 271-2; 370; 428-31) After approximately three months work, Greensphan submitted a revised model to Zenith, along with a tentative bid, dated September 26, 1966, and addressed to Maloney. The bid reflected a total price of $25.18 per unit, and included a revealed profit of $2.25 per unit. Normally, Zenith permitted its suppliers a 10% profit on items sold to Zenith. (Tr. 76)

Zenith sought but did not receive competitive bids on the Circle of Sound units. Maloney and Yonan solicited bids from five Zenith suppliers, including a Zenith subsidiary, but all refused to bid on the project. (Tr. 83-4; 378-80) Yonan was described by Maloney as having "primary responsibility" for negotiating with Greensphan for the purchase of small cabinets, but he was subordinate to Maloney in this area. Moreover, Zenith's sales department dictated the number of items to be ordered, and the frequency of the orders.

On February 9, 1967 Zenith issued a purchase order to Accurate Box for 1500 Circle of Sound units at a price of $25.18 per unit. Subsequently Maloney told Greensphan of a possible increase in Zenith's requirements for the

unit. In preparation for this anticipated increase in production Greensphan negotiated with union representatives to operate his plant during a contracted vacation period. In addition, Greensphan borrowed $50,000 and purchased another plant. (Tr. 427, 278)

During June, 1967, Greensphan received orders from Zenith for an additional 4743 units at a price of $30.99 per unit. The increased price resulted from blueprint revisions and engineering changes in the cabinets. On August 7, 1967, Accurate received an order for 8,050 units at a price of $30.99 per unit. On August 11, Zenith ordered an additional 7,500 cabinets at the same price.

Yonan's Demand for a Kickback

Some time during either October or November, 1967, Greensphan met with Yonan at Yonan's request. (Tr. 447-8) Yonan asked Greensphan how the quality of the Circle of Sound was progressing, and Greensphan replied that Zenith was happy and quality was good. Yonan added that he had seen reports which confirmed this opinion.

Yonan then asked if production was being stepped up, and Greensphan told him it was. Yonan replied that sales on the Circle of Sound were ever-increasing and said, "This is going to be a very big unit with Zenith Radio." Greensphan said he could not be happier because he felt his company had had the greatest part in preparing the model for marketing by Zenith.

At that point Yonan said, "You are going to make a lot of money on this unit because of the amount that you are going to be manufacturing." He added that "every-

body and their uncle" would like to manufacture the unit for Zenith. Greensphan replied that he and his company had worked hard on the unit and he certainly wanted to keep the business. Yonan repeated that the model was going to be "a big seller," and Greensphan again said that he couldn't be happier about the matter. (Tr. 451)

Then, Yonan said: "I don't want you to be a pig about this." (Tr. 451)

Greensphan asked him what he meant about not being a pig, and Yonan replied: "Well, you have a full 10%. You have a full 10% allowed into this unit that Zenith allows their suppliers, and you have got a full 10% in it." (Tr. 452)

When Greensphan replied that was the customary profit allowed by Zenith, Yonan said: "I would like to have a dollar a unit for each unit that is manufactured." (Tr. 452)

Because he was afraid of losing the business from Zenith (Tr. 458), on a project into which he felt he had put "so much time and effort and work" (Tr. 452), Greensphan agreed to pay Yonan a dollar a unit for Circle of Sound cabinets sold to Zenith. (Tr. 453)

At the conclusion of the case the Government conceded that Greensphan made the payments to Yonan because he "felt that he had to pay this money" to keep his business. (Tr. 723)

A few days after this conversation Greensphan had a telephone conversation with Yonan in which he explained that any payments made to Yonan would have to be made by check. The following Saturday, Yonan came into Green-

sphan's office and told him that Accurate would receive invoices from A & G Woodworking reflecting commissions due A & G, and that Greensphan should pay those invoices. (Tr. 468-71)

Accurate commenced making these payments to A & G Woodworking in December 1967. (Tr. 472) Payments totalling approximately $300,000 to A & G in this manner continued until December 1970. (Tr. 237-8; 472) A & G, in turn, made payments from August 1968 until August 1970 of slightly in excess of $100,000 to the defendant Yonan. (Tr. 238-9)

On April 11, 1968, subsequent to the commencement of payments to A & G Woodworking, Greensphan submitted a new bid to Zenith based on the Circle of Sound model then being produced and delivered. (Greensphan Exhibit 2) At the same time, Greensphan prepared an itemized cost sheet showing a complete breakdown of costs. (Greensphan Exhibit 2a) The bid price for the Circle of Sound at that time was $28.86, which included a profit margin of $2.57 a unit.

Two months later, the Value Engineering Cost Analysis section of Zenith prepared an eight-page itemized analysis of the price for which it felt the Circle of Sound cabinet units should be built. Alloting a profit of $2.58 per unit, Value Analysis concluded that the unit should cost Zenith $28.93 (Greensphan Exhibit 8), or 7¢ more than the existing Accurate bid. (Greensphan Exhibit 2)

Two weeks later, on June 24th, Zenith submitted and Accurate accepted a purchase order to manufacture 8,810 silghtly revised Circle of Sound units for $28.38. (Greensphan Exhibit 9)

Several cost analysists from Zenith testified that Greensphan's prices to Zenith on the Circle of Sound models were always fair and reasonable. Maloney, Yonan's superior, testified that at no time did Yonan ever request that he extend Greensphan any partiality or favoritism, and nor did Yonan himself, to Maloney's knowledge, ever extend any favors to Greensphan. Several Zenith purchasing agents, who negotiated contracts with Accurate Box for the purchase of "Circle of Sound" units, stated that Yonan treated Accurate Box impartially, and demanded strict performance and quality from Greensphan's company.

After Yonan left Zenith in late 1970, Zenith analyzed Accurate's bids on business over the prior three years. The report concluded that Accurate Box had always been the most competitive bidder on the business which it received, and that its performance on the "Circle of Sound" unit had been "outstanding", where other suppliers had wholly failed Zenith. Greensphan's company still maintained a business relationship with Zenith at the time of the trial of this case.

Reasons for Granting the Writ

I.

This most unusual mail fraud prosecution raises, on a record of extraordinary clarity, the issue of the very scope of the federal mail fraud statute. The opinion of the Court of Appeals here represents a very real extension of that statute, and opens a veritable "Pandora's Box" of potential federal prosecutions, for under its rationale virtually any undisclosed gratuity paid to an agent by reason of his employment, may be deemed a fraud actionable under the mail fraud statute.

The government's evidence together with the Petitioner's testimony, which the prosecution credited as being the "substantial truth", established that Greenspahn, a Zenith supplier, made certain payments to Yonan, a Zenith purchasing agent, at Yonan's behest and under threat of economic harm; that Zenith did not suffer any actual loss as a result of the payments; and that Greenspahn did not intend to obtain, nor did he obtain, any advantage as a result thereof.

Thus squarely raised is the issue of whether it is a scheme to defraud within the ambit of the federal mail fraud statute, 18 U.S.C. 1341, for a manufacturer to pay a kickback to a purchasing agent absent actual loss by the agent's principal, or proof of other advantage obtained or intended to be obtained by the manufacturer.

The theory that the payment of money to the agent of another corrupts the agent and dilutes his loyalty to his employer has been described as a constructive fraud.

Similarly, the receipt of commissions by an employee, because of his relationship with his employer, but not at his expense or to his detriment, has also been deemed a constructive fraud. See, *Epstein* v. *United States,* 174 F.2d 754, 763-6 (6th Cir. 1949); *Sushan* v. *United States,* 117 F.2d 110, 115 (5th Cir. 1941). These two federal circuits have recognized that the federal mail fraud statute does not reach such breaches of a purely equitable duty. *Epstein* v. *United States,* supra; *Sushan* v. *United States,* supra.[1]

Here, activities which can only be deemed a constructive fraud have been held actionable under the mail fraud statute. There can be no question but that Greensphan's payments to Yonan, and Yonan's receipt thereof, constituted nothing more than a breach of an equitable duty, as opposed to an "active fraud" which would be actionable under 18 U.S.C. 1341. Zenith suffered no monetary loss as a result of the payments, as Zenith normally permitted its suppliers to earn a 10 % profit on goods manufactured for Zenith, and Zenith had contracted with Accurate knowing that the company would be earning that 10% profit. These arrangements were established prior to Greensphan's agreeing to pay monies to Yonan, and subsequent Zenith cost studies of products purchased from Accurate, made both during the course of Greensphan's payments

[1] The mail fraud statute does reach those situations wherein a kickback is paid to secure an actual advantage, or with the intent to do so. *Sushan* v. *United States,* 117 F.2d 110 (5th Cir. 1941); *United States* v. *Proctor and Gamble Co.,* 47 F.Supp. 676 (D.C. Mass. 1942); *United States* v. *Fraser,* 303 F.Supp 380 (E.D. La. 1969). The statute may also reach those schemes wherein an employee is corruptly influenced by the payment of a kickback to give less than his faithful services to his principal, especially where the less than faithful services involved showing favoritism to the payer of the kickback. See, *United States* v. *Dorfman,* 335 F.Supp. 675, 679 (S.D.N.Y. 1971); *United States* v. *Fraser,* 303 F.Supp. 380, 383 (E.D. La. 1969).

to Yonan and after the fact of the payments had been revealed to Zenith, showed that Accurate's prices to Zenith were always fair, reasonable, and the most competitive on the business which Accurate received. Greensphan paid the monies to Yonan out of the profit which Zenith knew he was making on their business, but these funds were not generated at Zenith's expense.

To say that Zenith was deprived of the faithful services of Yonan merely because Yonan received money from Greensphan, without more, is a fiction created by principles of equity. The Fifth and Sixth federal circuits have recognized that such fictional, constructive frauds are not within the reach of the federal mail fraud statute. In affirming Petitioner's conviction upon the incontrovertible facts of this record, the Court of Appeals for the Seventh Circuit has placed itself squarely in conflict with the Fifth and Sixth Circuits on this issue, and has so broadened the reach of the statute that a torrent of mail fraud prosecutions are now possible for conduct which had not previously been deemed criminal.

II.

It was made manifestly clear at trial that Greensphan's payments to Yonan were motivated by fear that Yonan would improperly interfere with his right to freely compete for Zenith's business. Greensphan had already obtained contracts for production of "Circle of Sound" cabinets prior to being approached by Yonan, and had gained substantially all he was to gain from Zenith's business before acceding to Yonan's demand for the kickbacks. The government itself admitted that Greensphan paid the monies to Yonan because he "felt that he had to pay this money" to protect his business. (Tr. 723)

Mail fraud is a specific intent crime. See, e.g. *Williams* v. *United States,* 278 F.2d 535, 537 (9th Cir. 1960); *Beck* v. *United States,* 305 F.2d 595, 599 (19th Cir. 1962). Petitioner thus contended at trial that Yonan's threat of economic harm negated the potential existence on his part of an intention to defraud Zenith, and submitted jury instructions in accordance with this theory. However, the Court of Appeals held that Petitioner's defense of extortion was insufficient, and affirmed the refusal of the trial court to instruct the jury in accordance with that theory, on the ground that there had been no explicit threat of economic harm made to Greensphan.

Economic coercion as a defense to a charge of mail fraud has been recognized as a viable concept. See, *United States* v. *Miller,* 340 F.2d 421 (4th Cir. 1965), and *Daniels* v. *United States,* 17 F.2d 339 (9th Cir. 1927). While there is a dearth of case law on the point, the requirement of the Seventh Circuit of an explicit threat of economic harm to sustain the defense is directly at odds with those cases, decided in the context of the Hobbs Act, 18 U.S.C. 1951, that an extortionate threat may be made by other than explicit means. See, *United States* v. *Prochaska,* 222 F.2d 1 (7th Cir. 1955); *United States* v. *Kramer,* 355 F.2d 891 (7th Cir. 1966). The circumstances under which a threat of economic harm may be sufficient to negate an intention to defraud, and thus provide a defense to a charge of mail fraud, is a second issue of significance raised by Petitioner's conviction.

Conclusion

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

Nos. 72-1553, 72-1554, 72-1555

United States of America,

Plaintiff-Appellee,

v.

Andrew George, Irving Greensphan and Peter K. Yonan,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 795
BERNARD M. DECKER, *Judge.*

ARGUED FEBRUARY 12, 1973 — DECIDED APRIL 12, 1973

Before CASTLE, *Senior Circuit Judge,* FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* The three defendants were indicted for mail fraud in violation of 18 U.S.C. § 1341 and for aiding and abetting that fraud under 18 U.S.C. § 2. The indictment was ultimately in 18 counts.[1] The

[1] The original Count 18 was dismissed and Count 19 became Count 18 prior to submission of the case to the jury.

only variance in counts was that the last 17 involved additional mailing dates.

The indictment described defendant Peter K. Yonan as a cabinet buyer in the Purchasing Department of Zenith Radio Corporation. Defendant Andrew George was said to do business as A & G Woodworking Co. The other defendant, Irving H. Greensphan, was specified as president of Accurate Box Corporation, which supplied cabinets to Zenith.

The grand jury charged that from June 1967 through January 1971, the three friends devised a scheme to defraud Zenith whereby Yonan received kickbacks on Accurate Box Corporation's sales of cabinets to Zenith. To accomplish this, George allegedly submitted fictitious "commission" invoices of A & G Woodworking Co. to Greensphan's company. After these invoices were paid, George supposedly paid part of the proceeds to Yonan. The kickbacks were of course not disclosed to Zenith. The indictment alleged that the scheme deprived Zenith of its lawful money and property and of the honest and faithful performance of its employee Yonan's duties. The mailings mentioned in the indictment covered checks sent by Zenith to Greensphan's cabinet company before the latter was billed by George's company.

After a jury trial, the defendants were found guilty as charged. Yonan received a three-year sentence; George received a one-year sentence and was assessed a $1,000 fine on each count; and Greensphan received a six-month sentence and was ordered to pay a $1,000 fine on each count. On appeal, all defendants assert that the evidence was insufficient to convict them of mail fraud; George and Greensphan assail instructions; George complains of

the court's receipt into evidence of Zenith's conflict-of-interest policy; and Yonan attacks the court's refusal to sever his trial from Greensphan's. We affirm.

The evidence brought forward at the trial disclosed a novel scheme. Yonan went to work for Zenith in 1961 and was a buyer in the cabinet division of Zenith's Purchasing Department. He had "primary responsibility" for negotiating with cabinet vendors, and, in the words of his immediate supervisor, that meant "his responsibility was to send out the blueprints and gather in quotations, and where the price was too high, to try to negotiate it down to a proper level." Of course, the quotations Yonan negotiated were reviewed by his superiors and by other departments of Zenith. In 1966, Yonan was given the responsibility for finding and negotiating with a supplier of cabinets for Zenith's newly conceived "Circle of Sound" product. His responsibility also included arranging for delivery and monitoring the quality of the cabinets. His friend since the mid-fifties, defendant Greensphan, the owner of Accurate Box Corporation ("Accurate"), was tapped as the supplier. During the indictment years, Accurate was the sole bidder on and supplier of these cabinets. Yonan's supervisor thought Accurate's prices to be fair and reasonable, but in the absence of other bidders, could not conclude they were competitive. Zenith normally allowed its suppliers a maximum of 10% profit, and Accurate's prices reflected that profit margin. The Circle of Sound product proved to be a tremendous financial success. The Zenith checks listed in the indictment were received by Accurate in payment of the cabinets sold to Zenith.

Without recounting any actual threat by Yonan, Greensphan testified that he agreed to pay Yonan $1 per cabinet kickback on the model 565 Circle of Sound unit and later per cabinet kickbacks on other models because he was afraid he was otherwise going to lose Zenith's business. Yonan assertedly told him that "everybody and their uncle would like to get into this to manufacture this unit." He stated that Yonan's requests for such payments originated in October 1967. When he asked Yonan how the kickbacks were to be paid, Greensphan was told to pay A & G Woodworking Co's commission invoices. Greensphan never related these events to anyone at Zenith. He had known defendant George since 1960. He denied inflating any quotations to cover monies paid to Yonan.

Commencing in December 1967, Accurate received commission invoices from defendant George's A & G Woodworking Co. even though neither George nor A & G Woodworking Co. provided any services to Accurate. Accurate paid these invoices on the basis of a commission per unit on the types of models it shipped to Zenith.[2] Greensphan also cashed a $3,000 Accurate check payable to himself and gave the proceeds to George because he was fearful of losing Zenith's business. To conceal the set fee per unit commission on the cabinets shipped, Accurate's records showed the payments to George's company as 3.4% on monies Accurate received from Zenith rather than as fixed sums on each cabinet. However, on these records the total prices of the cabinets shipped to Zenith were not correct, but were altered to make the commissions correspond to

[2] On two Circle of Sound models, the commission was $1.00 per unit shipped, and on two others in was $.75 and $.20 per unit respectively.

3.4% thereof. From December 1967 until December 1970, Accurate paid George's company in excess of $300,000 in commissions. During the period in which Greensphan's company was paying the commission invoices of George's company, the latter paid Yonan kickbacks in excess of $100,000 through checks made out by George.

The Government's theory, credited by the jury, was that the kickbacks to Yonan were accomplished by Greensphan's payments of George5s company's fictitious commission invoices, with George then acting as a kickback conduit to Yonan. In this connection, it should be noted that in 1969 or 1970, Yonan asked Greensphan's company's controller for a report of the total commission payments then made by that company to George. Shipping quantities on at least one A & G invoice were confirmed to Yonan by Accurate's plant superintendent.

Zenith had a conflict-of-interest policy providing that no gratuities of any nature were to be bestowed on its Purchasing Department employees by suppliers. Yonan twice signed documents embodying that policy, which was annually brought to the attention of all suppliers of Zenith through letters sent out to them. Greensphan admitted receiving these letters during the period of time he was channeling the payments to Yonan.

A number of Zenith's employees testified that Yonan did not request preferential treatment for Greensphan and his company and that they had no knowledge of Yonan providing such treatment for them. It appears Yonan was insistent on quality and efficiency from Accurate.

Evidentiary Sufficiency of a Scheme to Defraud

The mail fraud statute[3] delineates two essential elements constituting the crime: a scheme to defraud and use of the mails in furtherance of the scheme. There is no dispute as to the sufficiency of the evidence to establish use of the mails, nor could there be. Defendants contend that the evidence was insufficient to satisfy the first element — the existence of a scheme to defrud. Reduced to its essential distillation, their argument is that because the kickbacks were never shown to come out of Zenith's pockets, as opposed to Greensphan's, because Yonan was never shown to provide or secure any special services for Greensphan and his company, and because Zenith was never shown to be dissatisfied with Accurate's cabinets or prices, no fraud within the contemplation of the statute can have occurred. We reject this argument, in part because it misses the point in two respects and in part because the particular scheme

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[3] 18 U.S.C.A. § 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or propertyby means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing shall be fined not more than $1,000 or imprisoned not more than five years, or both."

shown by the evidence to defraud Zenith is, from every defendant's point of view, within the reach of the mail fraud statute.

Since the gravamen of the offense is a "scheme to defraud," it is necessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss. *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1180-1181 (2d Cir. 1970); *Pritchard* v. *United States*, 386 F.2d 760, 766 (8th Cir. 1967); *Adjmi* v. *United States*, 346 F.2d 654, 657 (5th Cir. 1965); *United States* v. *Shavin*, 287 F.2d 647, 651-652 (7th Cir. 1961), certiorari denied, 375 U.S. 944. If there was intent on the part of a schemer to deprive Zenith of Yonan's honest and loyal services in the form of his giving Greensphan preferential treatment, it is simply beside the point that Yonan may not have had to (or had occasion to) exert special influence in favor of Greensphan or that Zenith was satisfied with Accurate's product and prices. And it is of no moment whether or not the kickback money actually came from Zenith. *United States* v. *Dorfman*, 335 F. Supp. 675, 679 (S.D.N.Y. 1971). Thus the district court correctly charged the jury that it was unnecessary for the Government to prove "that anyone actually be defrauded." Contrary to defendant's contentions, the evidence hardly shows that it was impossible for Yonan to exercise favoritism toward Greensphan. As the Court noted in *Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir. 1941), certiorari denied, 313 U.S. 574: "The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view." In our view the evidence shows

that Yonan did have opportunities to give Greensphan preferential treatment, particularly by avoiding the solicitation of potential competitors. Of course, the actual exercise of any such opportunity by a person in Yonan's position may be practically undetectable.

Furthermore, even if Yonan never intended to give Greensphan preferential treatment, and the Government does not argue that the evidence was sufficient to support a conclusion that he did, the defendants' argument still misses the mark. The evidence shows Yonan actually defrauded Zenith. We need not accept the Government's far-ranging argument that anytime an agent secretly profits from his agency he has committed criminal fraud.[4] Not every breach of every fiduciary duty works a criminal fraud.[5] But here Yonan's duty was to negotiate the best

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[4] See *United States* v. *Faser*, 303 F. Supp. 380, 383-384 (E.D. La. 1969); *United States* v. *Hoffa*, 205 F. Supp., 710, 716 (S.D. Fla. 1962).

[5] See *Epstein* v. *United States*, 174 F.2d 754 (6th Cir. 1949). In that case, heavily relied on by defendants, two of the defendants had directorates in both breweries and brewery supply companies, and the Government argued that because the breweries bought from these suppliers and the defendants did not disclose their conflict-of-interest positions, the defendants were guilty of mail fraud. The Court held such conduct was "constructive" and not "active" fraud and outside the purview of the mail fraud statute absent a showing that the supply companies' prices were unfair. Its rationale was that under applicable civil law, directors, on behalf of their corporations, could contract with themselves or corporations in which they were interested, and such contracts were completely valid so long as they were advantageous and made in good faith. Under these circumstances, mere non-disclosure did not generate a profit at the corporation's expense. However, those defendants did not have a duty to make

price possible for Zenith or at least to apprise Zenith that Greensphan was willing to sell his cabinets for substantially less money. Not only did Yonan secretly earn a profit from his agency, but also he deprived Zenith of material knowledge that Greensphan would accept less profit. There was a very real and tangible harm to Zenith in losing the discount or losing the opportunity to bargain with a most relevant fact before it. As Judge Learned Hand stated in a related context:

> "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed." *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir. 1932), certiorari denied, 286 U.S. 554.

Here the fraud consisted in Yonan's holding himself out to be a loyal employee, acting in Zenith's best interests, but actually not giving his honest and faithful services to Zenith's real detriment.

No refuge can be taken in Zenith's policy "normally" to allow suppliers a 10% profit and in Accurate's prices being within that margin. Nothing would have prevented

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their profit — the return on their investment in the supply companies — available to the breweries, whereas Yonan did have a duty to make his profit — an assumedly unmerited kickback — available to Zenith. There was no reason to believe disclosure by the defendants in *Epstein* would have, under the particular circumstances there, made any bargaining difference to the breweries, but Yonan's disclosure, in addition to making the scheme impossible, would have enabled Zenith to realize a substantial discount.

Zenith from bargaining with Accurate for a lesser profit margin, and it would be unrealistic to presume that Zenith would consider the fact of better than $100,000 in actual kickbacks to its buyers — over $300,000 in agreed-to-kickbacks — to be immaterial in its dealings with Greensphan. It is preposterous to claim that Zenith would have spurned such a discount if offered.

In this case, whether Zenith was to be deprived of Yonan's honest and faithful performance of his duties to the extent of his secretly profiting from his agency and concealing knowledge of the availability of that material sum from Zenith, or to the further extent of his meriting the payments which he received, a fraud within the reach of the mail fraud statute would be present.[6] The statute requires the existence of a scheme to perpetrate this fraud, and the question of evidentiary sufficiency boils down to whether the Government has proven that the defendants contemplated that Zenith suffer the loss of Yonan's honest and loyal services.

Indubitably the evidence showed a "scheme." The critical element is fraudulent intent. *United States* v. *Regent Office Supply Co., supra* at 1180. Each of the defendants asserts that there was insufficient evidence as to his intent to defraud Zenith of Yonan's loyalty and honesty, but we conclude the contrary.

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[6] The court properly charged the jury as follows:

"Now, to knowingly tamper or interfere with an employer-employee relationship for the purpose of and with the intent of depriving the employer of the employee's honest and faithful performance of his duties for the employer may constitute a fraud within the meaning of the mail fraud statute." See *United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942).

As to Yonan, his undisclosed receipt of the kickbacks by itself warrants a finding that he intended to defraud Zenith of his honest and loyal services. His employment duty was to negotiate the best possible deal for Zenith, or at least to apprise Zenith that Greensphan would be satisfied with a lesser profit margin. He is presumed to know that he could not personally profit by any decrease in price he could negotiate with Greensphan[7] and that any such decrease should be made available to Zenith. In sum, the jury could hardly help but infer that Yonan intended to do exactly what he did. Hence it was not necessary for the jury to conclude that when Yonan received the kickbacks, he intended to defraud Zenith further by giving Greensphan the favored treatment for which Yonan was paid.

The evidence also supports a finding that George contemplated Zenith would be defrauded of Yonan's honest and faithful services. George billed Greensphan for "commissions" on the Circle of Sound cabinets Greensphan sold Zenith though he provided no services to Greensphan. Checks totalling about $100,000, approximately one-third of the commissions, then passed from George to Yonan, with George apparently retaining an unmerited two-thirds. That George's payments to Yonan had their source in Greensphan's commission payments to George is shown by Yonan's call to Greensphan's accountant, asking about the commission sums paid to George by Greensphan and by Yonan's checking the shipping quantities on an A & G invoice with Greensphan's plant superintendent. George can hardly claim to have been an unwitting conduit for the

[7] Lest there be any doubt on that score, it may be noted that Yonan twice signed Zenith's conflict-of-interest policy, thus acknowledging this.

payments from Greensphan to Yonan. He submitted spurious invoices based on the number of cabinets Greensphan shipped to Zenith and made an enormous profit in the process. He, Greensphan and Yonan were mutual friends at the inception of the scheme, and, at least on one occasion, were observed together in Accurate's plant. He must have known Yonan's position at Zenith and the relationship between Yonan and Greensphan. If the substantial payments from Greensphan to Yonan were not designed to compromise Yonan's fiduciary duties to Zenith, why were they not made directly and openly instead of through George and disguised as commission payments to him? Why would the transaction be so shrouded in secrecy and spuriousness if Yonan could legitimately make and hide from Zenith an enormous profit from his employment position or curry Greensphan's favor? It would take a man of incredible naivete to play George's role in this scheme and not understand that Yonan was giving less than full measure of loyalty and honesty to Zenith. At least he must have known that some actual injury to Zenith was the reasonably probable result of this scheme. See *United States* v. *Regent Office Supply Co.*, *supra* at 1182.

Having admitted that he agreed to make the kickback payments to Yonan to ensure that he would not lose the Circle of Sound cabinet business, Greensphan argues that he lacked the requisite intent on the ground that he was the victim of extortion. He urges what is really an affirmative defense of extortion. However, he had no contractual agreements entitling him monopolistically to continue to sell cabinets to Zenith. He had no right to be protected from future competition. If he really feared Yonan would wrongfully try to shift the cabinet business to a competitor, why did Greensphan not go to Zenith with the

report that Yonan had asked for the kickbacks? He presented nothing to indicate why this course was not open to him. And certainly he could have gone to Zenith when and if Yonan had decided that a less deserving competitor should get the business. Under some circumstances a threat of economic injury may constitute a defense, but not here. Furthermore, since, by Greensphan's own account, Yonan did not actually threaten him with economic harm, the evidence does not support his claim. *United States* v. *Miller*, 340 F.2d 421, 425 (4th Cir. 1965). Accordingly, his tendered instructions B and C were properly refused. Under the evidence Greensphan's payments could be considered by the jury as an attempt to obtain an advantage against competition by purchasing Yonan's loyalty. Greensphan's "theory of defense," to the extent it was valid and supported by evidence, was adequately safeguarded because the instructions given as to intent "knowingly" and "willfully" as used in the two statutes specified in the indictment permitted the jury to accept the hypothesis that Yonan's economic pressure negatived Greensphan's intent to harm Zenith. Its choice not to do so was supported on this record.

Thus we conclude that there was sufficient evidence for the jury to find that each defendant intended to defraud Zenith.

Admissibility of Zenith's Conflict-of-Interest Policy

The Government introduced Zenith's conflict-of-interest policy as bearing on the knowledge of Yonan and Greensphan. It was clearly admissible for this purpose since Yonan's and Greensphan's knowledge of that policy bore on their intent to defraud, though it was not essential for proving that intent. The record does not show that Zenith's conflict of interest policy was admitted with reference to

George's intent. The trial testimony went to connecting the policy with Yonan and Greensphan only. The jury was correctly instructed that admissions, acts or statements of other *defendants* in the scheme were attributable to all only if the jury found the existence of a joint venture and if in furtherance thereof. No error was committed with respect to receiving in evidence Zenith's conflict-of-interest policy for the limited purpose for which it was offered.

Refusal to Sever Yonan from Greensphan's Trial

Yonan claims that Greensphan's defense was antagonistic, thus entitling Yonan to a mistrial and a separate trial. Here we fail to discern any conflict of defense strategies, much less one so irreconcilable "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *United States* v. *Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). True, Greensphan testified that Yonan asked him for kickbacks, but Yonan's only real defense to what the Government proved he did was that his conduct could not have defrauded Zenith. This defense would not be undercut because he asked Greensphan for kickbacks, and Greensphan presented the same defense.

Yonan's real complaint is that Greensphan, in an attempt to save himself, made Yonan out to be a blackmailer, and the jurors "could well conceive it their duty to remove such a person from society." But "the mere fact that * * * one may try to save himself at the expense of another is in itself alone not sufficient grounds to require separate trials * * *." *United States* v. *Hutul*, 416 F.2d 607, 620 (7th Cir. 1969), certiorari denied, 396 U.S. 1007. And Greensphan did not save himself. Furthermore, under the in-

structions given, the jury could not have convicted Yonan of extortion, and we see no substantial prejudice to warrant upsetting the presumption that the jurors followed the law as given to them. In sum, having found no clear likelihood of detriment to Yonan's defense or confusion in the jury's mind so great as to prejudice his fair trial, we find the trial judge did not abuse his discretion by trying all participants in the scheme together. *United States* v. *Kahn*, 381 F.2d 824, 838-839 (7th Cir. 1967), certiorari denied, 389 U.S. 1015.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 12, 1973

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

No. 72-1553, 72-1554 and 72-1555

United States of America,

Plaintiff-Appellee,

v.

Andrew George, Irving Greensphan and
Peter K. Yonan,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 2, 1973

Before

Hon. LATHAM CASTLE, *Sr. Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

United States of America,

Plaintiff-Appellee,

v.

Irving Greensphan,

Defendant-Appellant.

No. 72-1554

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(71 CR 795)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX D

18 U.S.C., Section 1341 provides:

§1341. *Frauds and swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1610

IRVING GREENSPHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue is whether petitioner was properly convicted of mail fraud despite the claim that the corporate victim suffered no actual loss and the allegation that petitioner's kickback payments to the victim's employee were in response to extortionate threats made by the employee.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on eighteen counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to imprisonment for 6 months; he was also fined $1,000 on each count. The court of appeals affirmed (Pet. App. A.).

1. The pertinent facts are set forth in the opinion of the court of appeals. In 1961, co-defendant Peter Yonan was hired by the Zenith Corporation as a buyer in the cabinet division of Zenith's purchasing department. When, in 1966, Zenith devised its plans for a new cabinet

known as the "circle of sound," Yonan had the responsibility of finding a supplier for the new cabinet and negotiating the price for furnishing the cabinets. The supplier chosen was the Accurate Box Corporation, owned by petitioner, a friend of Yonan's, and the sole bidder on the Zenith contract. From 1966 to 1970 Accurate Box continued to be the sole bidder on this lucrative Zenith contract. Zenith believed that Accurate Box's price was fair and reasonable, but in the absence of other bidders could not conclude they were competitive. The profit margin to Accurate Box was within the 10 percent profit Zenith usually allowed suppliers.

Late in 1967 Yonan made certain comments to petitioner which led the latter to believe that unless he furnished Yonan with a kickback, he might lose the Zenith business. Although aware of Zenith's written policy providing that suppliers were not to give gratuities to purchasing department employees, petitioner agreed to pay Yonan kickbacks disguised as payments to A & G Woodworking Company, which was owned by a mutual friend, Andrew George. Beginning in December 1967, Accurate Box received fictitious commission invoices from A & G Woodworking Company and paid out more than $300,000 in this manner. By December 1970, more than $100,000 was paid to Yonan. The financial records of Accurate Box were altered to reflect payments to A & G Woodworking of 3.4 percent on monies received from Zenith.

2. Petitioner claims that the mail fraud statute was not violated because Zenith suffered no actual loss. This argument is based upon the unfounded assumption that since Zenith normally permitted its suppliers a 10 percent profit, and cost studies made by that company verified that Accurate Box's price and quality were

acceptable and well within Zenith's guidelines, no loss can be said to have been incurred by Zenith as a result of the kickback scheme. The opinion of the court of appeals (Pet. App. 7-10), on which we rely, correctly notes that in a prosecution under 18 U.S.C. 1341, where the gravamen of the offense is a "scheme to defraud," it is unnecessary for the government to prove that the victim suffered an actual loss; moreover, Zenith was in fact defrauded since Yonan failed to negotiate the best prices possible for Zenith.[1] As a result, Zenith's payments included more than $300,000 which petitioner was prepared to forego while servicing Zenith. The fact that the contract price was acceptable to Zenith under its general profit margin policy does not preclude a showing of financial loss. Certainly Zenith would have been most receptive to an offer from petitioner containing a lesser profit.

Petitioner argues that he lacked the requisite intent on the ground that he was the victim of extortion. This argument has also been examined thoroughly and correctly rejected by the court of appeals (Pet. App. 12-13). As the court pointed out, petitioner had no contractual agreement entitling him to continue selling cabinets to Zenith. If he feared that Yonan might improperly deprive him of Zenith's business and wrongfully shift the cabinet business to a competitor, he could have reported the threat to Zenith; in any event, by his own admission, petitioner was not actually threatened by Yonan with economic harm.

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[1] Petitioner's reliance upon *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), for the proposition that payments to an employee amount only to constructive fraud not within the mail fraud statute, is fully answered in the opinion of the court below (Pet. App. 8, n.5).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07